

FILED
COURT OF APPEALS
DIVISION II

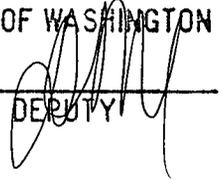
NO. 42302-2-II

2012 AUG 29 PM 1:05

IN THE COURT OF APPEALS

STATE OF WASHINGTON

STATE OF WASHINGTON

BY  _____
DEPUTY

DIVISION II

ANTHONY R. G

GORDON

Appellant

v.

CITY OF TACOMA; THE CITY OF TACOMA DEPARTMENT OF WORKS BUILDING

AND LAND USE SERVICES

Respondents.

APPELLANTS RESPONSE TO

RESPONDENT'S ANSWER

Codes and caselaw

Tacoma Municipal Code title 2

State v. Cleveland, 58 Wn. App. 634, 794 P.2d 546, rev. denied,

115 Wn.2d 1029 (1990)

Record on Review

Findings of fact and conclusions of law (FOF) entered on May 27, 2011.

Oral Ruling (OR) made March 24, 2011.

Respondents Response (RR)

Deposition of Rick Gordon (RGD)

RESPONSE TO RESPONDENT'S INTRODUCTION

The respondent continues to contend that the Petitioner is an "experienced landlord both personally and professionally." (PR1) While the petitioner has experience, each jurisdiction have competing and often changes rules and regulations. The City would like to portray their relationship with the Petitioner as one of mutual respect and accommodation. In 1999 the City initiated an action against the Petitioner regarding a property described at 1318 8th street where the tenants co-opted electricity. The Petitioners purported vast "experience" caused the City to issues seven (7) warrants for the arrest of both he and his wife's for building code violations. The Petitioners significant "experience" in the area of Tacoma Municipal Code caused him to be arrested and charged with a violation of the Municipal Building Code. The arrest of the petitioner and associated criminal action resulted in a

dismissal of all charges. Additionally, the City inspector offered the Petitioner a possible buyer of his property in the midst of their negotiations. (RGD 92-94)

When speaking of experience in a field it is important to look at one's own. Attorney who practices criminal law for 20 years may not be the best at representing someone in patent or admiralty litigation. Experience in a field is largely experience in a very narrow part of that field.

The Respondent cites Tacoma Municipal Code 2.01.060 as the basis for their litigation. The undisputed record is that the Petitioner was initially contacted on August 7, 2002. The following day August 8, 2002, the listed property was boarded up by the city in violation of TMC 2.01.060. The code requires that the cited individual receive 10 days from the date of notice to "secure the property." TMC 2.01.E(1). That 10 days allows the owner to secure the property, make appropriate changes, and cure the purported defect. The Petitioner here was denied that opportunity. Though this violation of due process was not even considered by the trial court which relied on what it considered the more egregious violation. Petitioner suffered continued abuse of discretion by the City of Tacoma as related 2.01.060. See RGD page 92 through 94.

RESPONSIVE TO ANALYSIS OF CONSTRUCTIVE NOTICE

FACTS: The Court determined that between March 1, 2003 and March 4, 2003, that Mr. Gordon had constructive notice of both the "condition of the property" and "the actions of the city." The court further articulated that at that point accrued fines were \$875.00 and further noted that the property had been boarded up by the City. The court made no specific finding that constructive notice extended to due process component of the appellant's argument i.e. right to Total fines due to grant use access to the subject property as of April, 2006 exceeded \$21,000.

ANALYSIS: First, lacking a finding to the contrary, the constructive notice was inferred by the court to the Plaintiff was specific to the "condition of the property" and "the actions of the city." The court specifically did not find that the Petitioner had constructive notice of the right to appeal the city's actions. The specific right that the court found the Respondent had violated and awarded damages. First, one would question, where in the record and on what basis would the court determine that constructive notice of germinated on that day. Yet the better inquiry is how a granting of constructive notice of the "condition of the property" and "the actions of the city" could determine a damage amount for a violation of procedural due process for failing to provide an appeal. This property was essentially seized by the city once fines were levied. The owner was stuck with an income loss property once the fines became more than could reasonably borne. The property truly became a money trap at that point. The Petitioner is out of pocket over \$30,000 in attorney fees that were not recovered and that does not consider actual damages for loss of rents and the personal cost of a half a decade of litigation the personal and emotional costs of fighting a government gone wrong.

RESPONSE TO RESPONDENTS VIEW OF DAMAGES

FACTS: The City of Tacoma denied the Plaintiff the right use the property for rental purposes. That impairment began August 7, 2002 when the City of Tacoma boarded up the property and continued with the denial of power and a water services as stated by Lloyd Swick in 2006 (RGD pg 144.) The impairment continued until May 2008. A total equaling greater than 69 months rental months. The petitioner was required to bring a Lawsuit against the respondent, pay attorney fees out of pocket in excess of \$80,000, pay fines of \$3700.00 and litigate this matter for nearly half a decade. Rent was determined by the court to amount to \$850.00 per month. Total damages awarded were for 5 months rental "loss," general damages at 7,500, and a partial award of attorney fees.

ANALYSIS:

The assessment of loss rent defies reason. The only possible analysis also is without merit that being: provide loss of rental income until there was a determination of constructive notice. The City encumbered the property on Aug 7, 2002 and determined constructive notice occurred March 7, 2003. That period alone amounted to seven months. Leaving alone that the property remained encumbered during the duration prior to and during the 2011 year litigation. The City spends a great deal of time mitigating against the actual and profound toll this matter took on the Plaintiff. Only a fulltime litigator or someone involved in the court system could so underestimate and undervalue the profound impact of lengthy and ongoing litigation on a family. Let alone the immense expense of litigation aside from the loss of opportunity and income from the litigated property.

RESPONSE TO THE RESPONDENTS COMMENTS ON COLLATERAL ESTOPPEL

In June of 2005, almost a year of accrued monthly penalties in excess of 1,000. The City of Tacoma assigned the fines associated with this case to a collection company. Mr. Gordon was pro-se and received an out of town assignment by his employer on the day set for the hearing. The collection company was granted a default judgment against the Appellant for fine and penalties accrued between 10/2002 and 11/2003. The fines and penalties were those same fines and underlying code violations that were at issue in the present case. The Small Claim action alleged an outstanding obligation with the City of Tacoma which was based on a violation of the Tacoma Municipal Code.

The order of default was signed without evidence or argument.

ANALYSIS:

Collateral estoppel is clear

"(1) the issue decided in the prior adjudication must be identical with the issue presented in the second; (2) the prior adjudication must have ended in a final

judgment on the merits; (3) the party against whom collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) application of the doctrine must not work an injustice. Cleveland, 58 Wn. App. at 639. "

Neither the first, second, nor fourth factors have been established;

1) There is no uniformity of issues. Courts considering the application of collateral estoppel narrowly construe the issue preclusion component of the rule. For example, in Barnes, the Court rejected the claim that the State was collaterally estopped from prosecuting the defendant for criminal profiteering because of its earlier civil forfeiture proceeding. 85 Wn. App. at 651.

Conversely, the issue presented to the Superior Court Trial Judge primarily focused on whether the City violated the Plaintiff's due process rights in the imposition of fines and penalties and denying his proper use of the property. Additionally, the issue of the plaintiff's damages was significantly at issue. The due process component considered by the trial court included the Plaintiff affirmative right to dispute the imposition of fines, penalties and resulting loss of property. The City's failure to provide due process was affirmed by the trial court and the plaintiff prevailed. The district court considered only whether the collection company had a valid claim for fines owed to the city and entered a default judgment accordingly. The Superior Court considered whether the same city provided due process in the imposition of the district court's fine and others. The court found that the City had not and ruled for the plaintiff.

2) There is no final judgment on the merits of the issues presented in this appeal. The State must "show that in the earlier litigation there was a final judgment on the merits of the issue at hand." Barnes, 85 Wn. App. at 651 . Additionally, The proponent must provide the reviewing court with a sufficient record of the prior litigation to facilitate such analysis ... Where it is not clear whether an issue was actually litigated, or if the judgment is ambiguous or indefinite, application of collateral estoppel is not proper.

Id. (internal citation omitted. The State has provided no record to show that this issue was "actually litigated" - presumably because none exists. Although the Gordon default judgment is a final judgment, the District Court failed to even consider much less adjudicate the question whether Mr. Gordon's due process rights were violated invalidating and purported application of fine, penalties and denied use of private property.

4) Application of the doctrine would work an injustice.

The City must show application of the doctrine does not work an injustice against Mr. Gordon - i.e., does not contravene public policy. Cleveland, 58 Wn. App. at 640. This the State cannot do. Mr. Gordon's employment with he federal Government required his presence out of the state at the time of the entry of the judgment. Mr. Gordon was appearing pro se therefore a default judgment was entered in his absence. The State has provided no record to show that Gordon's inability to be present at the previous judgment, based solely on the same fines and actions, critical to the superior court action somehow impacted or impacts his ability to bring the later action citing the city's violation of Due Process.

The doctrine of collateral estoppel derives from civil law and "bars re-litigation between the same parties of issues actually determined at a previous trial" Ashe v. Swenson, 397 U.S. 436, 442,90 S.Ct. 1189,25 L.Ed.2d 469 (1970). Setting aside for the moment the question whether the issues presented in this appeal were "actually decided." Again, in the case at bar, where was no actual factual prior litigation. It is well settled that he entry of a default judgment is the poorest form of judicial action

DATED :

August 28,2012

By: 

Anthony R. Gordon

**WASHINGTON STATE COURT OF
APPEALS DIVISION 2**

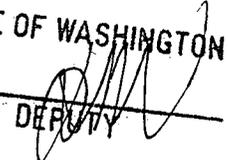
ANTHONY R GORDON,
Appellant,

CITY OF TACOMA; THE CITY OF TACOMA
DEPARTMENT OF WORKS BUILDING AND
LAND USE SERVICES

Respondents.

NO: 42302-2-II

DECLARATION OF SERVICE

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STATE OF WASHINGTON
BY 
DEPUTY

I, J. Rodney DeGeorge hereby declare as follows:

1. I am over the age of 18 years and not a party to this action. My residence address is:
8408 59th Ave SW Lakewood WA 98499.
2. On August 29,2012 I delivered to City Attorney's Office, City of Tacoma Washington:

1 copy of appellants response brief
3. Address of service:

747 Market St # 1120
4. Service was made as indicated below:
Personal Service to the clerk at the window, who appeared to be over 18 years of
age.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is
true and correct.

Signed at Tacoma, Washington on August 29, 2012.



J Rodney DeGeorge